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No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Appellant,

v.

CITIZENS ACTION COALITION OF INDIANA, INC., *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Under the Due Process Clause, may a public utility be required to absorb costs it prudently incurred to meet its statutory mandate to serve?

2. Is a public utility entitled to compensation under the Takings Clause for a power project it was compelled to cancel by operation of state law?

PARTIES

In addition to the parties listed in the caption, the parties to the proceeding in the Indiana Supreme Court included the City of Gary, Indiana; Bailly Alliance; the Utility Consumer Counselor; Bethlehem Steel Corporation; the Dalton Foundries, Inc.; Inland Steel Company; Jones & Laughlin Steel, Inc., Jones & Laughlin Steel Corporation Division; National Steel Corporation, Midwest Steel Division; Union Carbide Corporation; and United States Steel Corporation.

RULE 28.1 LISTING

Northern Indiana Public Service Company has no parent and no publicly held affiliates or subsidiaries.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Indiana Supreme Court (App. 1a-36a) is reported at 485 N.E.2d 610. The final order of the Indiana Public Service Commission (App. 39a-96a) is unreported.

JURISDICTION

The judgment of the Indiana Supreme Court, embodied in its opinion, was entered on November 19, 1985 (App. 1a), and rehearing was denied in an order entered January 3, 1986 (App. 37a). A notice

of appeal was timely filed in the Indiana Supreme Court on February 4, 1986 (App. 97a). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2) or, alternatively, 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. V, cl. 4—

> "[N]or shall private property be taken for public use, without just compensation."

U.S. Const. Amend. XIV, § 1, cl. 3—

> "[N]or shall any State deprive any person of * * * property, without due process of law."

Indiana Code § 8-1-2-1—

> "The term 'service' is used in this act in its broadest and most inclusive sense and includes not only the use or accommodation afforded consumers or patrons but also any product or commodity furnished by any public or other utility and the plant, equipment, apparatus, appliances, property and facility employed by any public or other utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which such public or other utility is engaged and to the use and accommodation of the public."

Indiana Code § 8-1-2-4—

> "Every public utility is required to furnish reasonably adequate service and facilities. The charge made by any public utility for any service rendered or to be rendered either directly or in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful. * * * ."

STATEMENT

1. Appellant Northern Indiana Public Service Company ("NIPSCO") is a public utility incorporated under Indiana law (App. 40a). It is authorized to supply electricity to the public in 21 counties (App. 41a), and under state law it is required "to furnish reasonably adequate service and facilities" at rates that are "reasonable and just" (Ind. Code § 8-1-2-4). Although NIPSCO has more than 360,000 customers (App. 41a), nine industrial firms account for 40 percent of its total electricity revenue (R. Vol. 15, p. 3192).

In 1970, NIPSCO applied to the Atomic Energy Commission for a permit to construct a nuclear power plant, Bailly, N-1, having determined that nuclear power would provide "the most economical" means of supplying new electricity for the utility's customers (App. 58a). At the time, as the Indiana Public Service Commission later said, "nuclear power held great promise for efficient and economic power supply" (App. 60a). Bailly was originally projected to go into service in 1976 at an estimated cost of $180 million; but through a series of federal agency and federal court proceedings Bailly opponents substantially blocked the project for over a decade. During the life of the project—including the 15 months available for actual construction work—NIPSCO put more than $190 million into Bailly.

Each of the challenges mounted against Bailly was decided in NIPSCO's favor (App. 61a), but by August 1981 it had become clear to NIPSCO that Bailly could no longer be brought into service in time to offer an economical means of producing electricity. Bailly's projected cost—assuming a 1990 service date

—had ballooned to $2.1 billion, more than 11 times the original estimate. Faced with the prospect that further spending on the project would be disallowed as "imprudent" by the PSC, NIPSCO cancelled the project.[1]

2. In November 1981, NIPSCO requested a rate order from the PSC authorizing it to recover, over a five-year period, the $190 million it had spent on planning and building the project.[2] NIPSCO's largest industrial customers supported its petition, as did the Utility Consumer Counselor, who represents the public (see Ind. Code § 8-1-1.1)—although these parties favored a slower recovery schedule. Like the Federal Energy Regulatory Commission and the regulatory bodies in the vast majority of other states that have faced the problem, the Indiana PSC had previously authorized recovery of the planning and construction costs of public utility projects cancelled prior to completion.[3]

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[1] Under Ind. Code § 8-1-2-48(a), the PSC "is invested with broad discretion to disallow for rate-making purposes any excessive or imprudent expenditures." *E.g., Office of Utility Consumer Counselor* v. *Indiana Cities Water Corp.*, 440 N.E.2d 14, 15 (Ind. Ct. App. 1982). Ind. Code § 8-1-2-48(a) provides:

> "If * * * the commission finds that * * * any * * * item of expense is being incurred by the utility which is either unnecessary or excessive, * * * such item or items so designated * * * shall not be taken into consideration in determining and fixing the rates which such utility is permitted to charge for the service which it renders."

[2] NIPSCO did not seek to have Bailly's costs included in its rate base and thus did not seek to earn any return on those costs.

[3] *E.g., NIPSCO*, Cause No. 32079 (Ind. PSC, Dec. 12, 1969) (underground gas storage facilities); *Indiana & Michigan*

In September 1982, the PSC unanimously granted NIPSCO's request, although it required NIPSCO to recover its costs over a 15-year period, rather than

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Electric Co., Cause No. 34588 (Ind. PSC, Jan. 31, 1977) (management studies); *Indiana & Michigan Electric Co.*, Cause No. 35251 (Ind. PSC, Sept. 21, 1978) (expansion of generating plant); *Public Service Co. of Indiana*, Cause No. 36318, 41 P.U.R. 4th 649 (Ind. PSC, June 10, 1981) (feasibility studies of nuclear power plants never built).

The Federal Energy Regulatory Commission's policy has been to permit public utilities to recover the costs of power projects cancelled prior to completion, as long as the utility has acted prudently; it has treated such costs as expenses to be recovered from rate-payers over a several-year period, rather than permitting such costs to be included in the utility's rate base. See, *e.g.*, *New England Power Co.*, 31 F.E.R.C. ¶ 61,047, p. 61,081 (1985); *Pennsylvania Power Co.*, 26 F.E.R.C. ¶ 61,354, p. 61,784 (1984); *Northern States Power Co.*, 17 F.E.R.C. ¶ 61,196, pp. 61,382-83 (1981), *aff'd*, 690 F.2d 674 (8th Cir. 1982) (per curiam); *New England Power Co.*, 8 F.E.R.C. ¶ 61,054, pp. 61,175-78 (1979), *aff'd*, 668 F.2d 1327 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). The FERC has jurisdiction over costs allocable to electric power sales for resale.

Regulatory bodies in 32 other jurisdictions have had occasion to decide whether to permit recovery of the costs of cancelled nuclear power plants; these bodies have been "virtually unanimous" in permitting recovery where the utility has acted prudently. See Sommers, *Recovery of Electric Utility Losses from Abandoned Construction Projects*, 8 WM. MITCHELL L. REV. 363, 371 & n.43 (1982) (citing cases). The Ohio Supreme Court, which construed state law to bar recovery of such costs, acknowledged that the weight of authority from other jurisdictions favoring recovery is "overwhelming." *Office of Consumers' Counsel* v. *PUC*, 67 Ohio St.2d 153, 423 N.E.2d 820, 826 & n.6 (1981), *appeal dismissed for want of a properly presented federal question*, 455 U.S. 914 (1982). See also *POWER* v. *Washington Utils. & Transp. Comm'n*, 104 Wash.2d 798, 711 P.2d 319, 331-33 (1985) (en banc).

the five-year period that NIPSCO had requested (App. 69a-70a). The PSC expressly found that NIPSCO's original decision to undertake Bailly had been "a reasonable undertaking by [NIPSCO] to meet its duty to serve" (App. 61a), and that the circumstances that finally rendered Bailly uneconomical were unforeseeable and entirely "beyond [NIPSCO's] control" (App. 59a-60a). It agreed that NIPSCO had been "forced" to cancel Bailly (App. 60a) and had not waited too long before deciding to do so (App. 64a-65a).

On transfer from the Indiana Court of Appeals, the Indiana Supreme Court reversed the PSC by a 3-2 vote.[4] It did not disturb the PSC's finding that NIPSCO's decision to undertake Bailly was a prudent attempt to meet its statutory mandate to provide adequate service at reasonable rates; nor did it disturb the PSC's finding that NIPSCO's decision to cancel the project was not only reasonable and timely but *forced* upon the utility—and that Bailly had been rendered uneconomical due to unforeseeable circumstances beyond NIPSCO's control.

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[4] The PSC's order had initially been challenged by Citizens Action Coalition and others in the Court of Appeals of Indiana, which reversed the PSC by a 2-1 vote (472 N.E.2d 938 (1984)), but the Indiana Supreme Court, at NIPSCO's request, assumed jurisdiction over the case and considered the appeal anew under Indiana's "transfer" procedure. See Ind. R. App. P. 11(B). The rule provides that, when the Indiana Supreme Court assumes jurisdiction over a case on petition for transfer, the Court of Appeals' decision is automatically "vacated and held for naught." Rule 11(B)(3). Because NIPSCO had asserted its federal constitutional claims in its petition for rehearing in the Court of Appeals (at pp. 3-4), those claims were properly before the Indiana Supreme Court. See Rule 11(B).

The majority concluded, however, that state law (specifically, Ind. Code §§ 8-1-2-1 and 8-1-2-4) did not permit NIPSCO to recover Bailly's costs because the project had never gone into service (App. 10a-12a).[5] Although the task of balancing investor and consumer interests is ordinarily entrusted to the PSC,[6] the majority construed state law to forbid the balance struck by the PSC in this case.[7] Over NIPSCO's objection that such a construction of state law would violate the Takings Clause and the Due Process Clause, the court—ignoring those constitutional claims—held that the utility must absorb the project's costs itself.[8]

The majority acknowledged that the PSC had previously permitted recovery of the costs of a project cancelled prior to completion, but it dismissed this precedent as insufficient to support NIPSCO's claim

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[5] Section 8-1-2-1 defines "service" and Section 8-1-2-4 requires utilities to provide "reasonably adequate service and facilities" at charges that are "reasonable and just." These provisions are set forth at page 2, above.

[6] See *State ex rel. Indianapolis Water Co.* v. *Boone Circuit Court*, 261 Ind. 583, 307 N.E.2d 870, 872 (1974).

[7] The majority based its construction of Ind. Code §§ 8-1-2-1 and 8-1-2-4 on the "clear delineation and balance of investor and consumer responsibilities" that it discerned in the statutory language (App. 10a); the majority did not purport to be guided by any extrinsic evidence of the legislative intent behind those provisions. Cf. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 468-69 (1981) (reversing state supreme court for "substituting its judgment for that of the legislature" in reviewing challenged state law).

[8] In its brief in the Indiana Supreme Court, NIPSCO argued against this reading of the statutes on the ground that precluding recovery would violate the Fifth and Fourteenth Amendments. Brief of Petitioner-Appellee NIPSCO in Support of Transfer 21-22, 60-62.

of reliance on past administrative interpretation (App. 13a-14a), ignoring the many cases from other jurisdictions cited by NIPSCO supporting recovery in the circumstances of this case.[9] The majority sought to bolster its holding with this observation:

> "[I]f an automobile company embarked on a new capital project to build a factory that would produce a new sports car and then, before it ever produced a sports car, cancelled it, the automobile company would ordinarily be unable to recover the cost from its consumers in a competitive market. This is the case we have here." (App. 11a.)

Chief Justice Givan and Justice Prentice dissented. The Chief Justice defended the PSC's order as "entirely within the law * * * and in fact the only realistic approach to the problem" (App. 25a). Justice Prentice decried as "confiscatory and unlawful" rates that do not permit a utility to recover costs for service and facilities mandated by state law (App. 34a). He criticized the majority for "an alarming lack of comprehension" in comparing "the losses occasioned by an automobile manufacturer attempting to bring a new product to market and those sustained by NIPSCO in endeavoring to develop a nuclear powered generating plant" (App. 32a-33a).[10]

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[9] The PSC had specifically relied on two of its own precedents in its order granting NIPSCO's request (App. 60a), while *amici* supporting NIPSCO had cited two others. See page 4, note 3, above. NIPSCO cited decisions from 18 other jurisdictions permitting recovery of the costs of cancelled utility projects. Brief of Petitioner-Appellee NIPSCO in Support of Transfer 41-42.

[10] While concurring with the majority with respect to recovery of the funds spent on construction work for Bailly,

THE QUESTIONS ARE SUBSTANTIAL

The Indiana Supreme Court's decision presents two questions of far-reaching significance for the regulation of public utilities.

The first, more general question is whether, under the Due Process Clause, a state, for rate-making purposes, may altogether ignore costs prudently incurred by a utility to meet its statutory mandate to serve. In the wake of the widespread cancellation of nuclear power plant projects in the last decade, a growing number of state courts, like the Indiana Supreme Court, are construing state law to deny recovery of such costs. On the purported authority of *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), they are holding that, so long as a state's exercise of its rate-making powers does not leave a utility in ruins, the utility can claim no constitutional injury. We respectfully submit that *Hope* was never intended to sanction such a radically restrictive view of the due process protections enjoyed by regulated public utilities—that, however broad a regulatory body's discretion may be in determining *how* a utility shall recover its costs from its customers, "under the due process clause of the Constitution no public utility [may] be compelled to absorb its own costs and not pass them on to the consumer." *PSC* v. *FPC*, 467 F.2d 361, 370 (D.C. Cir. 1972) (Wilkey, J.).

The second, narrower question is whether, under the Takings Clause, a public utility is entitled to

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Justice Shepard took the position that the utility should be allowed to recover its planning costs (App. 20a-21a). Thus, a majority of the Indiana court affirmed the PSC in this respect (see App. 38a) and NIPSCO has petitioned the PSC for an order implementing the court's decision.

compensation for a large-scale power project that it has been compelled to cancel by operation of state law. State law effectively required cancellation of Bailly, since further expenditures would have been imprudent and under Indiana law a utility cannot recover expenses imprudently incurred. The PSC acknowledged as much when it found that NIPSCO had been forced to cancel Bailly and that the decision to cancel was prudent. Requiring cancellation of the project, however, was the functional equivalent of bulldozing it. Cf. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). Because the cancellation of Bailly required by state law rendered NIPSCO's investment utterly valueless, and because NIPSCO enjoyed a "reasonable investment-backed expectation" that it would be allowed to recover Bailly's costs, the court's holding that NIPSCO must bear the project's costs itself is contrary to this Court's cases interpreting the Takings Clause. That the property belonged to a public utility does not change the analysis.

At stake here is not simply the loss that NIPSCO faces as a result of the Indiana court's decision. Dozens of other public utilities throughout the country could face literally billions of dollars in similar losses if regulatory bodies come to believe that they need not permit recovery of prudently incurred utility costs. Both because the Indiana court disregarded the guarantees of the Due Process and Takings Clauses in construing Indiana law, and because federal and state courts are already sharply divided over the Constitution's requirements in this area, the questions presented here are substantial and warrant plenary review.

I. Under the Due Process Clause, A Utility Cannot Be Compelled To Absorb Costs Prudently Incurred Pursuant to Its Mandate To Serve

At the outset, we emphasize what this case does *not* involve. It does not involve a state agency's discretion to treat a cost incurred by a utility as an expense item rather than a capital investment, or to choose between different methods of calculating the value of a utility's property. It does not involve a state agency's authority to defer a utility's recovery of its costs, or to aggregate the utility's costs with the costs of other utilities for rate-making purposes. In short, this case does not involve the *method* employed by state authorities in setting rates; this Court has made abundantly clear that, so long as the method employed permits the utility "the minimum return required under * * * the Constitution," *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 327 (1974), a utility cannot claim that the method employed has caused it constitutional injury. See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

But NIPSCO does not challenge the "method" of rate-making under Indiana law, as construed by the state's highest court. It does not complain that, under Indiana law, the costs it incurred in connection with Bailly will not be *correctly* accounted for in the rate-making process; it complains that those costs will not be accounted for *at all*, but will be treated instead as though they had never been incurred. A state regulatory body may enjoy nearly unlimited leeway under the Due Process Clause in balancing "the investor and the consumer interests" when it fixes a utility's rates, see *Hope*, 320 U.S. at 603, but investor interests are impermissibly sacrificed where,

as here, a state rate-setting system automatically ignores their investment. Under such circumstances no genuine "balancing" is performed at all. It is a bold leap from the principle that "no single method need be followed" by an agency in setting rates, *Wisconsin* v. *FPC*, 373 U.S. 294, 309 (1963), to the Indiana court's holding that prudently incurred costs may simply be ignored.

Plenary consideration by this Court is especially warranted in view of the emerging conflict among federal and state courts on the issue. Cf. Sup. Ct. R. 17(b). At least three courts have held—or implied—that due process requires that a utility be permitted to recover costs prudently incurred, notwithstanding the methodological leeway that rate-making bodies enjoy under *Hope*. See *Wisconsin Public Service Corp.* v. *PSC*, 109 Wis.2d 256, 325 N.W.2d 867, 870-71 (1982); *State ex rel. Union Electric Co.* v. *PSC*, 687 S.W.2d 162 (Mo. 1985); *PSC* v. *FPC*, 467 F.2d 361 (D.C. Cir. 1972) (Wilkey, J.); *Mississippi River Fuel Corp.* v. *FPC*, 163 F.2d 433 (D.C. Cir. 1947) (Prettyman, J.).[11] One other state court, like the Indiana court, has specifically held that due process

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[11] In *Wisconsin Public Service Corporation*, the Wisconsin Supreme Court held that "[i]t is arbitrary and capricious to authorize a utility to expand its facilities, spend large amounts of money prudently to accomplish that goal, and then force the utility to bear the entire risk of such expenditures." 325 N.W.2d at 871. Holding that the utility was entitled to recover costs prudently incurred in connection with a cancelled power plant, it stated: "Where expenditures are prudent, investors should be able to anticipate that all such costs will eventually be recovered from ratepayers." *Id.* at 869.

In *Union Electric Co.*, the Missouri Supreme Court, reviewing a state law said to preclude a utility from recovering the costs of a cancelled nuclear power plant, refused to give the

does *not* require that a public utility be permitted to recover such costs. See *Cleveland Electric Illuminating Co.* v. *PUC*, 4 Ohio St.3d 107, 447 N.E.2d 746, *appeal dismissed*, 464 U.S. 802 (1983).[12] On such a significant issue, this Court's guidance is critical.

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statute that construction, in order to avoid the "constitutional questions * * * presented if a utility [were] totally unable to recover a prudent expenditure made in good faith and, in the utility's view, for the benefit of the ratepayers." 687 S.W.2d at 166. It noted that the Supreme Court of New Hampshire, another state court which has disallowed recovery of cancelled plant costs on statutory grounds, specifically left open the question whether precluding recovery of such costs was constitutionally permissible. *Id.* n.7 (citing *Appeal of PSC*, 125 N.H. 46, 480 A.2d 20, 21 (1984)).

The D.C. Circuit has found it self-evident that denying a utility recovery of prudently incurred costs would violate due process. As noted above, Judge Wilkey wrote in 1972 that "under the due process clause of the Constitution no public utility [may] be compelled to absorb its own costs and not pass them on to the consumer." *PSC* v. *FPC*, 467 F.2d at 370. Judge Prettyman wrote in 1947 that rates, to be reasonable and just, must permit recovery of costs "properly incurred." Otherwise, he observed, "the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce." *Mississippi River Fuel Corp.*, 163 F.2d at 437 (reviewing FPC order under *Hope* criteria). See also *id.* at 450-51 (on petition for rehearing).

[12] In *Cleveland Electric*, the Ohio Supreme Court held that denying recovery for the costs of a cancelled nuclear power plant does not violate the Fifth or Fourteenth Amendments. 447 N.E.2d at 748-49. Although this Court dismissed an appeal from the Ohio court's decision "for want of a substantial federal question," 464 U.S. 802, this Court's decision, while a decision on the merits, "is not entitled to the same deference given a ruling after briefing, argument, and a written opinion." *Caban* v. *Mohammed*, 441 U.S. 380, 390 n.9

II. Under the Takings Clause, A Utility Is Entitled To Compensation for a Project It Was Forced To Cancel by Operation of State Law

Whether state regulatory action effects a "taking" of private property for which the state must compensate the owner is a question that this Court addresses on an essentially "ad hoc, factual" basis.[13] But it is clear enough that "forcing someone to stop doing things with his property—telling him 'you can

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(1979). "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Washington* v. *Confederated Bands and Tribes*, 439 U.S. 463, 476 n.20 (1979).

This Court has also dismissed an appeal from a New Jersey Supreme Court order dismissing a challenge to a lower court's decision upholding a rate order that the utility claimed did not properly balance investor and consumer interests. *Jersey Central Power & Light Co.* v. *Board of Public Utilities*, No. A-162-81T2 (N.J. Super. Ct. App. Div.), *certification denied*, 95 N.J. 217, 470 A.2d 433 (1983), *appeal dismissed*, 466 U.S. 947 (1984). Another utility has recently sought review of a Pennsylvania Supreme Court decision upholding a rate order entered by the state public utility commission; here, too, the utility complains that the PUC has given insufficient weight to investor interests in setting rates. *Pennsylvania Electric Co.* v. *Pennsylvania PUC*, 502 A.2d 130 (Pa. 1985), *jurisdictional statement pending*, No. 85-1493.

[13] *E.g.*, *Connolly* v. *Pension Benefit Guaranty Corp.*, 54 U.S.L.W. 4208, 4212 (U.S. Feb. 25, 1986); *Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2874 (1984); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-25 (1978). The Takings Clause, of course, is applicable to the states under the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 239 (1897).

keep it, but you can't use it'—is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." L. Tribe, *American Constitutional Law* § 9-3, at 460 (1978). See, *e.g.*, *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). The state need not assume title to or physically occupy property to "take" it; and while compensation is not automatically required if the owner remains able to obtain some benefit from his investment, see *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 131-38 (1978), compensation is required if the state's action leaves the property utterly without value and if in so doing the state frustrates "reasonable investment-backed expectations." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S. Ct. 3108, 3119 (1985). This is especially so where a private party has undertaken a project, as NIPSCO did, under a statutory directive to serve the public.

Here, we submit, Indiana has "taken" NIPSCO's investment in Bailly as surely as if it had bulldozed the project. "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes* v. *Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis in original). Although the state did not physically seize Bailly, or specifically order it cancelled, it left NIPSCO no choice but to abandon the project once it had become clear that the project could not economically be brought to completion; for as noted above, under Indiana law—as under the laws of every other jurisdiction—a utility cannot recover costs imprudently incurred, and it certainly would have been imprudent to continue with Bailly after its promise of economical service had evaporated. If NIPSCO were not a regulated public utility whose

costs could be disallowed by the state as "imprudent," nothing in state law would have prevented it from completing Bailly and seeking to recover its costs either through higher rates for the electricity supplied by Bailly, or through rates for the electricity supplied by other, less expensive projects.[14]

Destruction of NIPSCO's property obviously violated "reasonable, investment-backed expectations." Although—like any other firm—NIPSCO was never in a position to guarantee its investors that the project would be completed or that its costs would be completely or quickly recovered, the practice of the Federal Energy Regulatory Commission and the vast majority of state jurisdictions that have confronted the problem (including the Indiana PSC itself) supplied the most solid imaginable support for investor expectations that costs prudently incurred in connection with Bailly would be substantially recovered.[15]

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[14] This case contrasts dramatically with *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958), upholding a war-time order closing down "non-essential" gold mines for the duration of the war. The Court upheld the order as a temporary measure justified by the exigencies of war. 357 U.S. at 168-69. Here, cancellation of Bailly is permanent and no compelling exigency required it. Requiring cancellation of an uneconomical power project is a classic instance of public action that should be "compensated by the [public], rather than remain disproportionately concentrated on a few persons." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979).

[15] The record on which the PSC entered its order for NIPSCO in fact included expert-witness testimony to this effect—that, based on the practice of other public service commissions throughout the country, the typical NIPSCO investor *would* have expected the Indiana PSC to permit recovery of Bailly's costs in the event of cancellation (see

Investors in unregulated businesses enjoy no such assurance, and yet this Court has sustained Takings Clause claims by such firms. See, *e.g. Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862 (1984); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). It was no answer in these cases that the government in today's world may at any time destroy private property through regulation; it can be no answer here.

This is not to say, of course, that NIPSCO is entitled under the Takings Clause to recover Bailly's costs from its customers, but only that it is entitled to compensation from the state, however compensation may be made. Thus, if this Court were to hold that the State of Indiana cannot compel NIPSCO to absorb Bailly's costs, the legislature would not necessarily have to enact new legislation authorizing the PSC to permit recovery of such costs through increased rates. Instead, NIPSCO could sue Indiana under the state's statutory inverse-condemnation procedure (Ind. Code § 32-11-1-12), a course otherwise precluded by the Indiana Supreme Court's decision in this case that NIPSCO must absorb Bailly's costs

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R. Vol. 10, pp. 2026-27). NIPSCO did begin to advise investors in the mid-1970s that the extent and timing of recovery of Bailly's costs in the event of cancellation were uncertain, but it never suggested, prior to the project's cancellation, that recovery might be permanently and entirely denied. The PSC implicitly found that NIPSCO's investors had not shouldered the risk of such a loss when it authorized amortization of Bailly's costs over 15 years (App. 68a-69a); it certainly never factored into NIPSCO's authorized rate of return the risk of nonrecovery. Although NIPSCO's stock declined in value throughout the 1970s, the decline mirrored industry trends and could not be ascribed to Bailly's difficulties.

itself.[16] A favorable judgment by this Court would thus, at a minimum, enable NIPSCO to pursue its compensation claim against the state.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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[16] Ind. Code § 32-11-1-12 authorizes inverse-condemnation proceedings whenever a compensable taking has occurred, regardless of whether there has been a physical appropriation of property. See *State* v. *Lovett*, 254 Ind. 27, 257 N.E.2d 298, 304 (1970). See also *Board of Comm'rs* v. *Joeckel*, 407 N.E.2d 274, 278 (Ind. Ct. App. 1980). NIPSCO's right to recover compensation from the state does not depend in any event on the existence of a statutory damage remedy, as an apparent majority of this Court recognized in *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 653-61 (1981) (Brennan, J., joined by Stewart, Marshall & Powell, JJ., dissenting from dismissal of appeal for want of a final judgment); *id.* at 633-34 (Rehnquist, J., concurring in dismissal but "agreeing with much of what is said" on the merits in Justice Brennan's dissent). The Indiana Supreme Court rejected NIPSCO's taking claim *sub silentio*, and no further judicial proceedings have been ordered.